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IN THE SUPREME COURT OF
THE UNITED STATES
TERM 1982

MARY C. SMITH, CAROL R. DIMAIO,
and HOWARD E. WATTS, JR.,

Howard E. Watts, Jr., Petitioner

vs.

JOSEPH HORNE COMPANY, INC.,
a Pennsylvania corporation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

The lower court found that petitioner Watts made out a prima facie case of retaliatory firing and discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 by presenting evidence that shortly before he was laid off, respondent Horne's threatened to lay him off because the female plaintiffs Smith and DiMaio filed charges with the EEOC alleging they were not paid equally with him. The lower court did not, however, find in favor of petitioner Watts, but instead concluded that petitioner Watts did not carry his burden of persuasion in the face of evidence presented by respondent of greatly declining sales and contractual obligations to reduce the work force in order of seniority. The lower court made no finding as to whether

discriminatory motive was a substantial factor in the layoff of Watts. The question presented is:

1. Whether the Court erred in finding that petitioner Watts did not carry the burden of proving a discriminatory layoff where the evidence established that respondent's desire to remove him as the male basis of comparison to the female plaintiffs was a substantial factor in the layoff.

2. Whether the Court erred in refusing to make any finding as to whether discriminatory motive was a substantial factor in the determination to lay off Watts.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRIEDMAN and FRIEDMAN and ARNOLD M. FRIEDMAN and EDWARD B. FRIEDMAN, on behalf of petitioner HOWARD E. WATTS, JR., petition for a writ of certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Judgment Order of the Court of Appeals in the consolidated appeals appears in Appendix A to this Petition and is not reported. The Order of the Court of Appeals denying the Petition for Rehearing En Banc appears in Appendix B and is not reported. The District Court's Finding of Facts and Conclusions of Law appear in Appendix C. No opinion was rendered by the District Court. The Order of the District Court Amending its Findings of Fact and Conclusions of Law appears in Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 1982. (Appendix A, infra, p. A-3) A timely petition for rehearing en banc was denied on August 24, 1982. (Appendix B, infra, p. B-1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no statutory provisions pertinent to the questions presented in this petition.

STATEMENT OF THE CASE

1. This case involves the claim by a male petitioner, Howard E. Watts, Jr., that his layoff on July 8, 1972, by respondent Joseph Horne Company was retaliatory and discriminatory in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et. seq., as amended. Petitioner Watts and the two female plaintiffs, Smith and DiMaio, filed a joint Complaint in the District Court alleging that they were wig stylists at respondent company and that they all performed substantially the same work, but that the male petitioner, Watts, was paid a considerably larger salary than the female plaintiffs, Smith and DiMaio. Plaintiffs further alleged that on or about July 8, 1972, petitioner Watts was laid off by respondent in an attempt to remove the male basis

of comparison with the female plaintiffs.

2. The United States District Court for the Western District of Pennsylvania (the Honorable Alan N. Bloch) held in favor of the female plaintiffs, finding that they were discriminated against on the basis of sex in violation of Title VII, Appendix at A-999, and awarded back wages with interest to date of trial. Appendix at A-1000. With respect to petitioner Watts, however, the lower court found that although he made out a prima facie case of retaliatory firing and discrimination by presenting evidence that shortly before he was laid off, respondent Horne's threatened to lay him off because the female plaintiffs filed charges with the EEOC, he, nevertheless, failed to carry his burden of persuasion

in the face of evidence of respondent's greatly declining wig sales. The lower court entered judgment against petitioner Watts and in favor of respondent. Appendix at A-1000.

3. Plaintiffs Smith and DiMaio first became aware of the wage disparity between them and petitioner Watts in or about the end of April or beginning of May, 1972. Appendix at A-250. They complained to their union representative and, on June 6, 1972, Russell Klaypach, Business Agent for Local 1407 of the Retail Store Employees Union, approached Robert Neal, then Horne's Labor Relations Manager, and asked him to increase Smith's and DiMaio's wages to equal the wages of Watts. [Finding of Fact No. 29] Appendix at A-997. See also Stipulations Nos. 25, 26, and 27, Appendix

at A-707. Thereafter, following June 6, 1972, when respondent Horne's first learned that the female plaintiffs were complaining that they were paid less than Watts for doing the same work, a series of events occurred in rapid succession which culminated in Watts' layoff on July 8, 1972. In this period of little over a month between June 6, 1972, and July 8, 1972, the following occurred:

a. Robert Neal, the respondent's Labor Relations Manager, informed Lawrence F. Stoneberg, then Vice-President and General Superintendent, that he had received Russell Klaypach's telephone call. Neal told Stoneberg that he had a phone call from Russell Klaypach that two of the people in the department [the Wig and Millinery Department] were

complaining about a rate inequity and they were comparing themselves and their rate against Mr. Watts. Appendix at A-846.

When Stoneberg first learned of the female plaintiffs' wage disparity claim, his response was to tell Neal to advise Klaypach that layoffs are pending. Russell Klaypach, the union representative, testified that he had heard no mention of layoffs in the Wig and Millinery Department until June 26, 1972, when he met with Neal to discuss the female plaintiffs' claim of wage disparity.

b. On June 10, 1972, Watts was called in to the office of Robert Rieland, then respondent's General Merchandise Manager, at which time Rieland indicated displeasure with Watts' low sales and

with other aspects of Watts' performance.

At the time of this warning, the respondent Joseph Horne Company was already aware of the claim by Smith and DiMaio that they were being paid substantially less than Watts for performing the same work. The warning notice was blank when it was given to Watts to sign. Watts' book or selling costs were never before mentioned to him by respondent Horne's throughout his entire employment with Horne's, except on June 10, 1972, the time of the pretextual warning notice, and no complaint was ever made to Watts about his sales performance before this date. Moreover, Joanne Govannini, the then Buyer for respondent's Wig and Millinery Department, testified that there was no custom of reviewing an employee's book or selling

costs with him and that employees in the department had no access to such information. Appendix at A-662. Indeed, Govannini testified that she did not look at selling costs on an individual basis, but, rather, "looked at it as a department total." Appendix at A-662.

The warning of Watts and the warning notice to Watts were an attempt to create a pretext for firing Watts when Horne's already knew of the female plaintiffs' wage disparity claim although respondent does not now contend that Watts was laid off pursuant to the warning notice or as a result of his own sales, but contends that he was fired as a result of a general reduction in force in the Wig and Millinery Department.

c. On June 14, 1972, Russell

Klaypach sent a letter to Robert Neal formally demanding equal pay for plaintiffs Smith and DiMaio. [Plaintiffs' Exhibit No. 23.] Appendix at A-1023.

d. On June 26, 1972, Russell Klaypach, the union representative, met with Neal for lunch in an attempt to resolve the wage discrepancy. Appendix at A-488. At this meeting, Klaypach told Neal "that the girls were contemplating some further action" and that he "thought we could settle it for a reasonable figure." Appendix at A-488. Neal responded that "he couldn't do that" and also stated "that if Mr. Watts were laid off, we wouldn't have a problem". Appendix at A-488. Klaypach took this as a threat to lay off petitioner Watts. Appendix at A-488. The lower court credited Klaypach's testimony and

found that respondent Horne's had threatened to lay off petitioner Watts.

e. On July 8, 1972, petitioner Watts was laid off, twelve days after Neal threatened Klaypach to solve the female plaintiffs' wage disparity claim by threatening to lay him off and nine days after the female plaintiffs filed their charges with the EEOC.

4. The respondent contends that the layoff of Watts was due to a reduction in force in the Wig and Millinery Department, and in this regard, the lower court found that in 1971 and 1972 sales of wigs declined steadily at Horne's. [Finding of Fact No. 27.] Appendix at A-997. Petitioner Watts does not dispute the lower court's finding with regard to decline in sales

and procedure for layoffs, [Findings of Fact Nos. 27, 35] Appendix at A-997-998, but contends that the layoff of Watts on July 8, 1972, was the means by which respondent Horne's sought to remove the male basis of comparison with the female plaintiffs and that Watts was laid off pursuant to the June 26 threat by Neal. Petitioner contends and the evidence supports that discriminatory motive, that is, the desire to remove Watts as the male basis of comparison for the equal pay claims of the female plaintiffs, was the reason for Watts' layoff on July 8, 1972, or at the very least, was a determinative or substantial cause of the layoff.

5. Petitioner Watts filed a Motion To Amend and Supplement Findings of Fact and Conclusions of Law requesting

the lower court to find that the request by the female plaintiffs to increase their wage to the wages of Watts was a "substantial factor in the layoff of Watts" (Appendix at A-1002) and to conclude that respondent Horne's discriminated against Watts because of his sex and in retaliation for the charges of the female plaintiffs (Appendix at A-1004). The lower court denied petitioner's request (Appendix at A-1013) and made no finding as to whether discriminatory motive was a substantial factor in the determination to lay off Watts.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the standard of causation to be applied where there is

an issue of mixed motives in proving a discriminatory discharge. The question is of profound significance in proving violations of Title VII of the Civil Rights Act of 1964.

The judgment of the District Court, affirmed in a brief Judgment Order by the Court of Appeals, was based on findings of fact and conclusions of law made by the Court. There was no opinion by the Court in support of its decision. Moreover, the Court did not address the question of mixed motivation in proving a discriminatory discharge.

The findings of fact and conclusions of law of the lower court, together with the stipulations of the parties at trial, implicitly require a finding in favor of Watts. Watts presented

substantial direct and circumstantial evidence that respondent Horne's motive in laying him off was wrongful. Even if the decline in sales was also a factor in the decision to lay him off, the layoff still violated Title VII of the Civil Rights Act of 1964 as discriminatory motive was a "determinative factor" in the layoff. The decision of the court below, that Watts did not carry his burden of persuasion in the face of evidence presented by respondent of greatly declining sales and contractual obligations to reduce the work force in order of seniority is in conflict with the decisions of the Third Circuit Court of Appeals and the decisions of other courts of appeal. Moreover, the standard of causation should be resolved by this Court since the issue in the present case will continue to arise whenever an

employer can articulate a legitimate non-discriminatory motive for a discharge after a plaintiff has proved a prima facie case of discrimination.

The standard of causation to be applied where there is an issue of mixed motives has been the subject of various formulations in the different courts of appeal. In Smithers v. Bailar, 629 F.2d 892 (3d Cir., 198[illegible] the Third Circuit Court of Appeals dealt with the issue in the context of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§621-634. In Smithers, the Court adopted the rule that improper motive must be "a determinative factor" in order to impose liability, that is, that a plaintiff need not prove that age was the employer's sole or exclusive consideration, but only that age made a

difference in the determination. The rule enunciated in Smithers appears to be equally applicable to the Title VII situation. Indeed, Smithers has been cited as authority in the Title VII context in Hill v. United States Postal Service, 522 F. Supp. 1283, 1303 (S.D.N.Y., 1981).

The rule as enunciated in Smithers that the discriminatory motive must be a determinative factor is elaborated upon by the Smithers court in its discussion of Laugesen v. Anaconda, 510 F.2d 307 (6th. Cir., 1975) and Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, (E.D. Mich., 1976), relied upon by the lower court. The court in Smithers stated:

> "... In Laugesen, a discriminatory discharge case, the court employed a

two-part test for deciding ADEA claims: first, plaintiff must show that age was one factor considered by the employer and second, plaintiff must prove that age made a difference in the disputed decision. 510 F.2d at 317. The Laugesen court, reciting the familiar tort law principle that there may be more than one proximate cause of an event, held that plaintiff need not prove age to be the sole or exclusive cause of the action. Rather plaintiff must establish that age played a part in the decision, even though the employer could demonstrate strong and perhaps more compelling non-discriminatory reasons for his actions. The Mastie court interpreted Laugesen to mean that the employer's consideration of age must have been 'a determinative factor' in the decision. 424 F. Supp. at 1321-22... [Footnote omitted; Emphasis added] 629 F.2d at 897."

The evidence adduced at trial in the instant case clearly indicates that the desire to remove Watts as the male basis of comparison and thereby to defeat the claims of the female plaintiffs "made a difference" in the decision to lay off Watts on July 8, 1972. Watts was threatened and the threat was carried

out when he was laid off on July 8, 1972, a little over a month after Horne's first learned of the female plaintiffs' claim.

Moreover, Watts' claim is reinforced by the context of discrimination in which the events leading to his layoff on July 8, 1972, occurred. There is strong evidence of discriminatory animus both in the pretextual warning of Watts of June 10, 1972, and in the threat to lay him off which preceded his layoff. The fact that the respondent was actively discriminating against the female plaintiffs at the very same time these events occurred is additional strong circumstantial evidence that discriminatory motive was a substantial or determinative factor in the layoff of Watts on July 8, 1972.

The Title VII cases found in the Third Circuit which discuss the standard of causation to be applied when there is an issue of mixed motives appear to state a less stringent standard than that enunciated in Smithers. In Goodwin v. City of Pittsburgh, 480 F. Supp. 627 (W.D. Pa., 1979), affirmed per curiam, 624 F.2d 1090 (3d Cir., 1980), the rule was stated that when it is shown that an improper motive was "at least in part a factor" then the termination violates Title VII.

In the instant case, petitioner Watts should prevail whether the Goodwin standard or the Smithers standard is applied because Watts met his burden of proof in showing that discriminatory animus was a substantial part of respondent Horne's motive in laying him off.

By concluding that although Watts made out a prima facie case of retaliatory firing and discrimination, he did not meet his burden of persuasion in the face of evidence presented by respondent of declining sales, the lower court disregards the applicable standard of causation. It is submitted that had the lower court applied the Smithers rule, which is the appropriate legal standard, it would have found for Watts despite the evidence submitted by respondent of declining sales. Improper motive must only be a determinative factor in order to impose liability for discriminatory discharge and a plaintiff need not prove it to be the sole or exclusive cause of the action. The lower court's conclusion that Watts did not carry his burden of persuasion in the face of respondent's evidence of declining sales was therefore

an error. Particularly in view of the effect of this decision in proving discrimination under Title VII and the failure of the Court of Appeals to follow its own decisions, review of the decision below is essential.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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